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No. 90-1195

In The

Supreme Court of the United States

October Term, 1990

DANIEL LEARY,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER A POLICE OFFICER VIOLATED THE FOURTH AMENDMENT WHERE, AFTER OBTAINING A GENERAL CONSENT TO SEARCH AN AUTOMOBILE, HE OPENED A CLOSED, BUT UNLOCKED, OPAQUE MEDICINE JAR FOUND IN THE BACKSEAT OF THE AUTOMOBILE?

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

REASON FOR DENYING THE WRIT:

A GENERAL AND UNRESTRICTED CONSENT TO SEARCH AN AUTOMOBILE AUTHORIZES THE SEARCH OF ALL CONTAINERS FOUND INSIDE THE AUTOMOBILE. 5

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

CASES:

Florida v *Jimeno, cert granted*, No. 90-622 10

Gamble v *State*, 318 Md. 120, 567 A2d 95 (1989) 10

People v *Mirenda*, 57 NY2d 261, 455 NYS2d 752, 442 NE2d 49 (1982) 10

State v *Wells*, 539 So2d 464 (Fla, 1989), *aff'd on other grounds* 110 S Ct 1632 (1990) 9

United States v *Anderson*, 859 F2d 1171 (3d Cir 1988) 10

United States v *Battista*, 876 F2d 201 (D.C. Cir 1989) 10

United States v *Covello*, 657 F2d 151 (7th Cir 1981) 10

United States v *Dyer*, 784 F2d 812 (7th Cir 1986) 10

United States v *Kapperman*, 764 F2d 786 (11th Cir 1985) 10

United States v *Ross*, 456 US 798 (1982) 5-8

United States v *Sealey*, 830 F2d 1028 (9th Cir 1987) 10

United States v *Smith*, 901 F2d 1116 (D.C. Cir), *cert denied* 111 S Ct 172 (1990) 10

STATUTORY AUTHORITIES:

MCL 333.7214(a)(iv) 1

MCL 333.7403(1), (2)(a)(ii) 1

MISCELLANEOUS AUTHORITY:

3 LaFave, *Searches and Seizures*, § 8.1(c) (2d ed, 1987) 8-9

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COUNTER-STATEMENT OF THE CASE

The account of the relevant proceedings set forth in Petitioner's petition is essentially correct. However, his recitation of the facts is somewhat incomplete.

Following a bench trial, Petitioner was convicted of Possession of 225 to 650 grams of Cocaine, contrary to MCL 333.7403(1), (2)(a)(ii); MCL 333.7214(a)(iv). He was sentenced to serve 20-30 years imprisonment.

At trial, the evidence was all stipulated to and the only witness gave a brief summary of the facts. (T, 9-13). Petitioner did not cross-examine the testifying officer. (T, 13). The People rested. Petitioner offered no argument. (T, 14). The court found Petitioner guilty as charged. (T, 14-15).

Prior to trial, Petitioner had challenged the search that resulted in the discovery of the cocaine. A sup-

pression hearing was conducted over several days.[1] The trial court issued an opinion denying Petitioner's motion to suppress the evidence. The denial of that motion is the mainstay of Petitioner's appeal.

At the suppression hearing, Officer John Samuilow, of the Troy Police Department, testified that he was dispatched on December 28, 1982 at 2:30 p.m. to investigate a traffic accident. (EH1, 3-4). The officer found both parties to the accident and their cars at a gas station. (EH1, 5-6). One of the two male subjects was the Petitioner. (EH1, 7). Both men approached the officer. The officer asked both for their license and vehicle registration. (EH1, 7).

The other party, George Durkee, gave the officer the requested documents. The Petitioner asked, "What do they look like?" The officer explained to the Petitioner what the items looked like and Petitioner went to his car to get them. (EH1, 8). While Petitioner was gone, Durkee told the officer that Petitioner had not wanted to call in the police. Petitioner had wanted to settle the matter between themselves. (EH1, 9-10). Durkee also commented to the officer the Petitioner's behavior was strange. (EH1, 10). Additionally, right after the accident, Petitioner handed a small package to the occupants of another car. (EH1, 10). Durkee told the officer that he thought Petitioner was on "dope." (EH1, 11).

Petitioner returned to where the officer and Durkee were. He gave the officer a Florida driver's license and a Michigan registration, saying the car belonged to his

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[1] References to the transcripts of the evidentiary hearing will be as follows: "EH1" refers to the proceedings on February 23, 1984; "EH2" refers to the proceedings on February 23, 1984 where Petitioner testified; and, "EH3" refers to the proceedings of March 29, 1984.

brother-in-law. Both Durkee and Petitioner were in the backseat of the officer's patrol car answering questions about the accident. (EH1, 13). The officer observed that the Petitioner's eyes were red and that he was constantly wiping his nose for no apparent reason. (EH1, 14). The officer thought Petitioner might be on some prescription drug and that that fact might somehow be related to the accident. The officer asked Petitioner for a second time whose car it was. This time Petitioner answered that it was his stepbrother's. (EH1, 15). The officer became suspicious. (EH1, 16).

The officer inquired of Petitioner whether he had spoken to anyone at the accident scene other than Durkee. (EH1, 16). Petitioner said no. When confronted with Durkee's representation that Petitioner had passed a package to the occupants of another car, Petitioner said that he had spoken to some friends at the scene. He denied anything about a package. The officer became suspicious. Samuilow asked the Petitioner again whose car it was. This time Petitioner said it was a friend's. (EH1, 17).

When asked about drinking or drugs, Petitioner denied having used either. The officer asked Petitioner if there was anything in the car that should not be. According to the officer, Petitioner replied, "No, go ahead and take a look for yourself." (EH1, 18). The officer asked, "You don't mind?", to which the Petitioner responded, "No, go ahead." (EH1, 18-19).

The officer went up to Petitioner's car and looked inside. (EH1, 23). Samuilow opened the door and saw a brown cardboard box in the backseat. Next to the box was a brown bottle or jar with a white top. The officer recognized the name of an animal drug on the bottle. (EH1, 24). He picked up the bottle and opened it. (EH1, 25). Inside were some pills and nine folded

plastic bags containing white powder. (EH1, 26). The officer asked Petitioner if he knew what the substance was. Petitioner responded that he wanted to talk to his attorney. (EH1, 27).

Samuilow radioed in for assistance. The officer who arrived on the scene identified the powder as cocaine. (EH1, 28). Petitioner was arrested for possession of a controlled substance. (EH1, 32).

Petitioner testified at the suppression hearing. He denied giving the officer permission to look in the car. When Samuilow asked if there was anything in the car that should not be, Petitioner testified he said "no." Petitioner contended that the officer then said, "Well, if that's the case, then you wouldn't mind if I looked in your car." (EH2, 10). Petitioner testified he asked the officer, "For what reason," not knowing whether or not the officer had a right to look in. Accordingly, Petitioner claimed he told the officer to "do what you have to do." (EH2, 11). However, Petitioner felt he had by these words not given consent to search the car. (EH2, 14-18).

On cross-examination, Petitioner related that the car accident occurred as he tried to enter a parking lot. Petitioner was supposed to meet someone at the parking lot and deliver a package. (EH2, 15). After the accident, the people he was supposed to meet arrived. (EH2, 15-17). He gave them a "gift" and the people left. (EH2, 17).

Petitioner acknowledged that he never told the officer not to look in the car. (EH2, 18). He had remained at the scene of the accident voluntarily. (EH2, 17). The officer testified that Petitioner was free to leave the area at any time but that he, the officer, was going to keep the Petitioner's driver's license and

registration until preparation of the accident report was completed. Petitioner was not in custody until arrested for the possession of cocaine. (EH1, 32). In fact, Petitioner had the door of the patrol car open while he was inside. (EH3, 21). Petitioner was not a prisoner.

The circuit court found that Petitioner had consented to the search of his automobile. (Whether the officer asked to search the car or Petitioner invited the officer to search the car is of little moment since under either scenario Petitioner gave his consent.)

REASON FOR DENYING THE WRIT

A GENERAL AND UNRESTRICTED CONSENT TO SEARCH AN AUTOMOBILE AUTHORIZES THE SEARCH OF ALL CONTAINERS FOUND INSIDE THE AUTOMOBILE.

Petitioner contends that the general consent he gave to search his automobile, as found by the trial court, did not authorize the opening of a closed medicine jar found in the backseat of that car. Respondent submits that Petitioner's attempt to limit by law the unrestricted consent he granted should not be permitted. Such an interpretation would contradict this Court's holdings in closely-related areas involving searches.

This Court in *United States* v *Ross*, 456 US 798, 825 (1982), held that under the "automobile exception" to the Fourth Amendment's warrant requirement, a warrantless search of an automobile based on probable cause extended to every part of that vehicle including its contents that might conceal the object of the search. This Court noted that if the permissible scope of a warrantless search of an automobile did not include containers and packages therein, the efficacy of such searches would be practically nullified:

> Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.
>
> 456 US at 820. (footnote omitted)

In the footnote supporting this observation, the Court pointed out:

> During virtually the entire history of our country — whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile — it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.
>
> 456 US at 820, n 26.

This Court in analyzing the lawful scope of a search of a specified area explained that "nice distinctions" must give way in deciding which components may be searched:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. *A warrant to search a*

> *vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way,* and when its purpose and its limits have been precisely defined, *nice distinctions* between closets, drawers, and containers, in the case of a home, or *between glove compartments, upholstered seats, trunks, and wrapped packages,* in the case of a vehicle, *must give way to the interest in the prompt and efficient completion of the task at hand.*
>
> *This rule applies equally to all containers,* as indeed we believe it must.
>
> 456 US at 820-822. (footnotes omitted; emphasis added)

The Court noted that on a practical level a prohibition against opening containers could exacerbate an intrusion into an automobile:

> The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered por-

> tion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* [v *United States*, 267 US 132 (1925)] and *Chambers* [v *Maroney*, 399 US 42 (1970)]. Cf. nn. 19 and 22, *supra*.

As noted in *Ross*, 456 US at 825, the scope of a permissible warrantless search would be no broader and no narrower than a magistrate could legitimately authorize by a warrant.

Although *Ross* involved a probable cause search, the Court's analysis should apply with equal vigor to consent searches. The scope of an officer's authority to search should not be restricted simply because it was authorized by a defendant's consent instead of from probable cause found by either a magistrate or a police officer. When an individual gives the police general, unrestricted permission to search his car, he should naturally expect that containers therein will also be searched as part of the search of the car.

In the instant case, given that Petitioner had been involved in a traffic accident and had been described as possibly on "dope," as having wanted to avoid the police and as having red eyes and as constantly wiping his nose for no apparent reason, it was reasonable to expect that the officer would be interested in the medicine bottle or jar in the backseat of Petitioner's automobile. Petitioner did not limit his consent in any way to the search.

As noted in 3 LaFave, *Searches and Seizures*, § 8.1(c), (2d ed, 1987) at 160:

> Consents to search are not given in the abstract; the police are interested in searching a

> particular place, and thus it is the practice for them to specify a certain place, such as a residence or vehicle. If, as is likely, the consent given in response is general and unqualified, then the police may proceed to conduct a general search of that place.
>
> (footnotes omitted).

Once the parameters of the consent search are established, there are still inner limits. Usually, however, such limits do not prohibit the opening of closed but unlocked containers:

> Assuming . . . a general and unqualified consent was given, then the boundaries of the place referred to mark the outer physical limits of the authorized search. Even within those limits, however, the police do not have carte blanche to do whatever they please. Certainly they may not engage in search activity which involves the destruction of property, and this would seem to bar breaking into locked containers. Somewhat more difficult is the question of *whether such a general consent permits the opening of closed but unlocked containers* found in the place as to which consent was given. *Ordinarily, it would appear that the answer is yes,* particularly if the police have indicated they are searching for a small object which might be concealed in such a container.
>
> *Id.*, at 161. (emphasis added)[2]

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[2] Petitioner relies upon *State* v *Wells*, 539 So2d 464 (Fla, 1989), *aff'd on other grounds* 110 S Ct 1632 (1990). However, there the police after obtaining consent to search the trunk of a car found a piece of locked luggage. They broke open the locked luggage with a knife. In the instant case, the police did not have to break open the closed jar. Thus the intrusion was not as great since there was no property damage.

In fact, most courts have held that a general consent permits the opening of containers found in the place for which consent was given, particularly in the case of cars. *See: United States* v *Smith*, 901 F2d 1116, 1118 (D.C. Cir), *cert denied* 111 S Ct 172 (1990); *United States* v *Battista*, 876 F2d 201 (D.C. Cir 1989) (the Court rejected the notion that to search a suitcase an officer would have to play a game of "Mother-may-I" where he would have to ask for permission to remove each article from the suitcase to see what lay underneath); *United States* v *Anderson*, 859 F2d 1171 (3d Cir 1988); *United States* v *Sealey*, 830 F2d 1028, 1032 (9th Cir 1987); *United States* v *Dyer*, 784 F2d 812, 816 (7th Cir 1986); *United States* v *Kapperman*, 764 F2d 786, 794 (11th Cir 1985); *United States* v *Covello*, 657 F2d 151 (7th Cir 1981); *Gamble* v *State*, 318 Md. 120, 567 A2d 95 (1989); *People* v *Mirenda*, 57 NY2d 261, 455 NYS2d 752, 442 NE2d 49 (1982).

In sum, Petitioner's Fourth Amendment rights were not violated where the search of the medicine jar in his automobile was the natural outgrowth of the general, unlimited consent he gave to search his auto.[3] Any other holding would create a new fuzzy area in the law of search and seizure where extensive line-drawing would have to be indulged in by the courts involving "fine distinctions."

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[3] Admittedly, a similar issue is pending before this Court in *Florida* v *Jimeno, cert granted*, No. 90-622. If this Court finds the question in *Jimeno* to be identical to that of the case at bar, certiorari should not be granted. Instead, Petitioner's petition should be held pending this Court's resolution of *Jimeno* and then be disposed of accordingly.

CONCLUSION

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying the Petitioner's petition for Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

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